No. 14677

In the United States Court of Appeals For the Ninth Circuit

VANCE W. WILLIAMS, *Appellant,*

vs.

TIDE WATER ASSOCIATED OIL COMPANY, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLANT'S REPLY BRIEF

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REPLY TO COUNTER-STATEMENT OF THE CASE

Before discussing the authorities upon which appellee relies, we deem it advisable to direct the Court's attention to certain statements contained in appellee's counter-statement of the case which are not supported by the record.

The following statement appears on page 3 of appellee's brief: "After sanding this area appellant examined the foredeck for other oil spills requiring sanding but saw none (R. 142)." This statement infers that the appellant examined the entire foredeck including the area between No. 2 and 3 tanks where he later slipped and fell. That was not the fact. To the contrary, appellant testified that the inspection made by him was from forty to forty-five feet from

where the accident subsequently occurred. We quote from pages 142 and 143 of the record:

> "Q. And Mr. Williams, did you, in looking around did you look over in the area under the catwalk between tanks 2 and 3 to see if there was any oil or grease in that area?
>
> A. No, that is out of the immediate vicinity of where I was at that time.
>
> Q. Well, if there were any oil or grease in the vicinity under the catwalk and in the vicinity between 2 and 3 tanks, could you have seen it from where you stood?
>
> A. Not from where I were, no.
>
> Q. How far away in feet would you be from the area between, the catwalk between 2 and 3 when you were standing over here sanding at S-1?
>
> A. That must be forty, forty-five feet.
>
> Q. So you would have been obliged to have looked a distance of forty or forty-five feet?
>
> A. Yes, sir."

Appellee called only two witnesses to testify as to the conditions existing on board the MV "TIDEWATER"; Captain Robert W. Daly and Second Officer De Jong. As was pointed out in appellant's brief (pages 26 and 27) Captain Daly made no inspection of the deck on the day of the accident and Second Officer De Jong made only a casual inspection sometime prior to the accident and no inspection immediately following the accident. On page 4 of appellee's brief it is stated that Second Mate De Jong made routine inspections of the foredeck "both before and after Williams' accident." The record establishes that there was no in-

spection by Second Officer De Jong after the accident. De Jong was engaged for the better part of an hour in caring for the appellant (R. 271) and he did not have time to make a personal investigation (R. 266) of the accident because of other duties.

REPLY TO APPELLEE'S ARGUMENT ON FIRST SPECIFICATION OF ERROR

Appellee makes the bland assumption that the cases cited by the appellant set forth a minority doctrine. This assumption is based upon the appellee's rationale of a number of cases where the question at issue in this appeal was not directly involved, but where language used by the various courts which was not necessary to the opinion in the cases cited, was interpreted by the appellee to support its position.

The only two appellate cases cited by the appellee which were directly in support of its position were the cases of *Skolar v. Lehigh Valley R. R.* (2CCA 1932) 60 F.(2d) 893, and *McGhee v. United States of America* (2CCA 1947) 165 F.(2d) 287. Appellee cites these cases and quotes therefrom as present effective authority. At no place in its brief does appellee state that these two cases have been expressly overruled by the same Circuit with regard to the very question at issue in this appeal. *Balado v. Lykes Bros. S. S. Co.* (2CCA 1950) 179 F.(2d) 943. Counsel's brief refers to the *Balado* case as "a perfunctory opinion * * * (which) * * * adopted Judge Maris' reasoning that the statutory election under the Jones Act pertains only to the selection of the forum." (Appellee Br. 16)

As pointed out in appellant's brief (Br. 21) the *Balado* opinion expressly names the *Skolar* and *McGhee* cases as being overruled in so far as these cases hold that an action for damages under the Jones Act cannot be joined with an action under maritime law for unseaworthiness. It is significant that the Second Circuit in the *Balado* case refers to the language used in the *Skolar* and the *McGhee* cases in support of such election, as "dicta."

Not only is there no minority or majority rule as suggested by appellee, there are no cases in any appellate court which directly pass on the issue in this appeal which supports appellee's position. If the assumption of a majority view is based upon District Court or State Court cases which have passed on the question, simple mathematics establish that the great majority of such cases support appellant's position. Several of the District Court and State Court cases which have denied the right to join both causes of action have been expressly overruled by other cases in the same district. *Reed v. The Arkansas* (S.D. Cal.) 88 F. Supp. 993; *Thomsen v. Dorene B.* (S.D. Cal.) 91 F. Supp. 549; *Hill, Jr. v. Atlantic Navigation Co.* (D.C. Va.) 1954 A.M.C. 2150.

The remaining cases cited by the appellee involve issues other than the one in this appeal. Appellee cites language used in these cases in support of its position. We will briefly discuss the rules established by the Supreme Court cases cited by appellee.

In the case of *Panama R. R. v. Johnson* (1924) 264

U.S. 375, 69 L.Ed. 748, (quoted at page 7 of appellee's brief) the court merely passes on a right of a seaman to proceed at law or in admiralty and does not define the scope of "election" accorded. In the case of *Engel v. Davenport* (1926) 271 U.S. 33, 70 L.Ed. 813, (quoted at page 7 of appellee's brief) the primary questions confronting the court concerned the concurrent jurisdiction of State and Federal courts under the Jones Act and the application of the then two year statute of limitations in such cases. Any reference to election of remedies is pure dicta. The case of *Plamals v. The Pinar Del Rio* (1928) 277 U.S. 150, 72 L.Ed. 827 (quoted on page 8 of appellee's brief) the court holds that in an action where unseaworthiness is not proven no right of lien exists. Any reference in this case to an election under the Jones Act is again simply dicta. In the case of *Lindgren v. United States* (1930) 281 U.S. 38, 74 L.Ed. 686 (quoted on page 9 of appellee's brief) the court is only concerned with the second clause of the Jones Act having to do with death cases. This case holds that the Jones Act does not change the former rule to the effect that there is no indemnity for wrongful death under the general maritime law. Any reference to an election under the first clause of the Jones Act is also dicta.

We again repeat that the rule is now well established that where a seaman's injury was due to unseaworthiness of the vessel, or due to the negligence of the officers or members of the crew, or both, there is but a single wrongful invasion of the seaman's rights, and there are not two separate claims or causes of action.

The seaman is bound to proceed under both theories as a basis of liability in one action unless he wishes to run the risk of being deprived of relief altogether. *Pacific S. S. Co. v. Peterson,* 278 U.S. 130, 73 L.Ed. 220 (quoted on page 9 of appellee's brief) illustrates the point perfectly.

In that case a seaman brought an action against his employer to recover damages for personal injuries suffered at sea. The shipowner defended on the ground that prior to the commencement of the action plaintiff had "elected to receive wages to the end of the voyage and maintenance and cure for any injuries which he received on said voyage" and that "the plaintiff in accepting said wages * * * and * * * maintenance and cure * * * elected to take compensation for said injury under the general admirality and maritime law * * * and the plaintiff cannot now elect to sue or maintain this action for damages under * * *the Jones Act." The Supreme Court defined the sole issue to be "whether if the plaintiff had demanded and received maintenance, cure and wages from the defendant this constituted an election which prevented him from thereafter maintaining a suit for compensatory damages under the statute" (278 U.S. at p. 136). The inquiry was thus directed to determining whether the action, if maintainable, would result in double recovery for the same legal wrong, or whether the right to maintenance and cure and wages is cumulative to the right of compensatory damages. In the course of its opinion, 278 U.S. at 136, the Court pointed out that

the general language used in *Panama R. Co. v. Johnson (supra)* does not define the scope of the election or the precise alternatives accorded, nor does the "incidental statement" in *Engel v. Davenport (supra)* define its scope. The Court concluded that the right to maintenance, cure and wages is cumulative to the right to recover compensatory damages, pointing out that the former grows out of the "personal indenture" created by the relation of the seaman to his vessel, that it does not extend to compensation for the effects of the injury, and therefore does not affect or displace the right to recover damages for injuries resulting from negligence or unseaworthiness.

In plain terms, the Court there held that recovery of maintenance, cure and wages is cumulative to the right to recover compensatory damages, and therefore recovery of the former does not bar the latter. But, recovery of damages under the new rules for injuries caused by negligence does constitute a bar to recovery of indemnity under the old rules for injuries occasioned by unseaworthiness, for the reason that, whether the injuries were caused by negligence, or unseaworthiness, or both combined, there is but a single legal wrong justifying but one recovery of compensatory damages.

Appellee relies heavily on the dicta in *Pacific S. S. Co. v. Peterson (supra)* and quotes a portion of that opinion(appellee's brief p. 9). In that portion of the quotation omitted by the appellee, the Supreme Court clearly recognizes that whether the cause of the seaman's injuries be based on negligence or unseaworthi-

ness there is but a single invasion of his primary right of bodily safety:

> " * * * Unseaworthiness, as is well understood, embraces certain species of negligence; while the statute includes several additional species not embraced in that term. *But whether or not the seaman's injuries were occasioned by the unseaworthness of the vessel or by the negligence of the master or members of the crew, or both combined, there is but a single wrongful invasion of his primary right of bodily safety and but a single legal wrong,* (*Baltimore S. S. Co. v. Phillips,* 274 U.S. 321, 71 L.Ed. 1972, 42 Sup. Ct. Rep. 600) *for which he is entitled to but one indemnity by way of compensatory damages.*" (Italics supplied.)

The procedure adopted by the appellant at bar, before being compelled to make an election by the District Court, for the assertion of two grounds of liability in the present action did not and could not result in double recovery for a single legal wrong.

Appellee's statement that the Fifth Circuit in *Smith v. Lykes Bros.-Ripley S. S. Co.* (1939) 195 F.(2d) 604, was also confronted with the identical question (the joinder of a cause of action for negligence with unseaworthiness) is not borne out by the reading of that case. There the seaman had recovered a judgment in an action for personal injuries based on negligence. Subsequently he brought another action and sought to recover the amounts due him for maintenance and cure arising out of the same injury. The Fifth Circuit held that an action for damages and one

for maintenance and cure were two separate causes of action citing *Pacific S. S. Co. v. Peterson supra,* and that a recovery for personal injuries would not bar an action for maintenance and cure, unless the prayer for damages in the personal injury action included the same elements involved in a claim for maintenance and cure. Because of an incomplete record the case was remanded to determine if the elements of damages in maintenance and cure were included in the instruction on damages in the personal injury case.

It is thus apparent that that case hardly involves the "identical question" as appellee would have this court believe. As a matter of fact the Circuit Court of Appeals for the Fifth Circuit in a most recent decision, *U. S. A. v. Smith adm.* (CCA5 March, 1955) 1955 A.M.C. 812, assumes, as established by law, that an action based on unseaworthiness and negligence may be joined in the one action. We quote the opening lines of the opinion:

> "*Richard T. Reeves,* Ct. J.: 'This action by the administrator for the benefit of the parents and dependents of Jeff Smith, deceased, was brought under the Jones Act, 46 U.S. Code 688, as well as under the admiralty law for unseaworthiness."

The note 1 to the opinion in 1955 A.M.C. appears as follows:

> "Appellant does not contest that an action for unseaworthiness may be joined with an action for negligence under the Jones Act. See *McCarthy v. American Eastern Corp.* (3 Cir.) 1953 A.M.C. 1865, 69, 175 F.(2d) 724, 727."

At the present writing this case does not appear in the

Federal Reporter. We cannot state, therefore, if the same note appears in the Federal Reporter.

The opinion in *U. S. A. v. Smith (supra),* affirms the finding of the District Court in favor of the plaintiff which held that the vessel was unseaworthy and that those in charge of her were negligent.

We direct this Court's attention to the most recent case of the United States Supreme Court in which a cause of action for personal injuries based on negligence and unseaworthiness was combined and considered. *Boudoin v. Lykes Bros. S. S. Co.* (U.S. S.Ct. Feb., 1955) 1955 A.M.C. 488. We frankly admit that the issue as presented here was not involved in that case. This case, however, assumes, as did the Circuit Court of Appeals for the Fifth Circuit, that a cause of action based on unseaworthiness and on negligence could be joined. We base this assumption upon the fact that no criticism or comment is made of such joinder. We quote the following opening portion of the opinion:

> "Mr. Justice Douglas delivered the opinion of the court:
>
> " 'This is a suit by an American seaman against the owner and operator of an ocean freighter, the Mason Lykes, upon which he was formerly employed. He based his claim for recovery both on negligence and on breach of the warranty of seaworthiness. The case was tried by the court upon waiver of jury. The district court found for the plaintiff, holding that the ship owner breached its warranty of seaworthiness and that its officers were negligent.' "

The Supreme Court in reversing the Circuit Court and affirming the opinion of the District Court found that there was sufficient evidence to support a cause of action for the breach of warranty of unseaworthiness. Therefore, it was not necessary for them to reach the question of negligence. However, Mr. Justice Reed concurred in the result on the ground of the negligence of the ship's officers.

It is significant that both in this case and in the *Smith* case in the Fifth Circuit no comment or criticism was made concerning the joinder of both unseaworthiness and negligence in one cause of action.

REPLY TO APPELLEE'S ARGUMENT THAT REQUIRING ELECTION WAS HARMLESS ERROR

We have some difficulty in understanding appellee's argument that the order of the Court requiring appellant to elect was harmless error. Appellee's entire argument is predicated upon the assertion that if appellant did step in an oily spot this was but a transitory condition and as such would not sustain an action for unseaworthiness against the owner of the vessel.

Appellee simply ignores and attempts to eliminate from the consideration of this Court the proof adduced at the time of trial concerning the unseaworthy condition of the foredeck of the MV "TIDEWATER" due to the use of hull paint on its deck rather than a non-skid deck paint. There was substantial evidence of the failure of appellee to use sand or other abrasives to be added to the hull paint on the foredeck. There

was evidence that the failure to use proper deck paint or to add sand and abrasives to the paint used made the deck dangerously slippery at all times, and even more so when wet or oily. Proof of this unseaworthy condition as a proximate cause of appellant's accident and injuries is clearly established by the record and definitely noted in appellant's statement of the case as set out on page 4 of his brief.

The testimony concerning the condition of the deck was sufficient to support a finding that the vessel was unseaworthy because of this condition. If it was unseaworthy, then the question of due care or the standard of a reasonably prudent man to be applied to the use of the preventive measures to keep the deck safe is not involved. *Mahnich v. Southern Steamship Co.,* 321 U.S. 96; *Seas Shipping Co. v. Sieracki,* 328 U.S. 85. If the condition resulted in unseaworthiness of the vessel, then there is a liability upon the vessel, even though the unseaworthy condition was unknown to the owner. This Court recognized this ruling in the most recent decision of *Lahde v. Soc. Armadora del Norte* (CCA9) 1955 A.M.C. 828:

> "However, under recent decisions of the Supreme Court setting such a cause of action is stated even though the unseaworthy condition is unknown to the owner. *Boudoin v. Lykes Bros. S. S. Co., Inc.,* U.S. S.Ct., 1955 A.M.C. at 488."

The prejudicial error is apparent. Under the Court's ruling there was no instruction to the jury which would have submitted the rule of unseaworthiness, *i.e.,* that of absolute liability for consequential

damages arising from an unseaworthy condition. On the contrary, the jury was instructed that the sole responsibility of the ship owner was that of due care, that of a reasonably prudent man, etc. (R. 294, 295, 296). The instruction to the jury applied this test to those facts which established unseaworthiness, the condition of the deck with reference to the type of paint used and the method of applying the paint used. The jury was instructed (R. 297) and it was necessary for them to find that a reasonably prudent man would have used such paint or applied sand, before they could reach the issue as to whether or not non-skid deck paint was used or sand was applied. Under the evidence, even that of the defendant, such paint or sand was required and its absence rendered the ship unseaworthy.

REPLY TO APPELLEE'S ARGUMENT ON SECOND AND THIRD SPECIFICATIONS OF ERROR

Appellant's brief has heretofore discussed and set out his argument on his second and third specifications of error. We do not believe that the appellee's argument as set forth in its brief calls for repetition of the matter set forth in appellant's brief. We have some difficulty in finding where appellee answers the argument of appellant on these two specifications as both answers attempt to cover the same subject matter and rest primarily on some argument relative to a transitory condition.

We do feel, however, that it is necessary to call this Court's attention to the fact that appellee's statement

that the trial court's instructions were submitted without assignment of error, by appellee, is not correct. Specific exception was taken by counsel for appellant to the trial court's instructions before the jury retired (R. 309) and the error of the court had been previously called to its attention in prior discussion.

We find no argument in appellee's brief directed to appellant's second specification of error under that heading in appellee's brief other than the heading itself. We have been unable to find an answer anywhere in appellee's brief on this point. There is some discussion by appellee on the third specification of error, that relating to the requirement of notice, before a duty arises upon the vessel operator to clean up an oil spill.

If an oily condition of the deck would support an issue of unseaworthiness, under the evidence in this case relating to tankers, then, of course, no notice of any kind is required or is necessary to establish liability. *Lahde v. Soc. Armadora del Norte (supra)* p. 830, 1955 A.M.C.

With relation to the question of negligence, whatever may be the duty on dry cargo ships, under the testimony in this case there is an immediate duty to clean up oil spills when they occur. Here the standard of care is established by the testimony of appellee's own witness including the master of the MV "TIDEWATER," Captain Robert W. Daly. His testimony was to the effect that oil spills must be constantly guarded against and that there was a standing order requiring the immediate clean up of oil spills *as they occur* (R.

235). The existence of such an oil spill is of itself evidence that someone was not doing their job (R. 236, 237).

Under the rule of *International Stevedoring Co. v. Haverty,* 272 U.S. 50, liability of a vessel is established to an injured person arising out of the failure of duty or negligence of fellow servants.

Under the evidence in this case, oil spills on the deck of this ship cannot be classified as transitory as the appellee owner knew that spills constantly occur; hence the standing order. Under the facts of this case the instruction given by the court (R. 296) was error.

CONCLUSION

It is respectfully submitted that the trial court erred in accordance with specification of errors stated in this appeal and such errors are of an extremely prejudicial nature. The Judgment of the District Court should be reversed and the case remanded to it for a new trial.

Respectfully submitted,

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